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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SUE FEIN, Personal Representative
Of The Estate of Richard Fein,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether an estate tax law which does more than change the rate of tax and is applied retroactively is a per se violation of the Fifth Amendment of the United States Constitution as being a deprivation of property without due process of law?

(2) Whether applying an estate law retroactively taxing property which the decedent could not possibly have known would be taxed at the time the decedent gave away the property nor could have known would be taxed at the time of decedent's death, is so unreasonable as to amount to a deprivation of property without due process of law?

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OPINIONS BELOW

The opinion of the United States District Court, the Honorable William Hungate presiding, appears in the appendix (Appendix A, pp. A-1 to A-6).

The opinions of the United States Court of Appeals for the Eighth Circuit finding for Respondent and denying Petitioner's request for rehearing en banc appear in the appendix (Appendix B and C, pp. A-7 to A-14).

JURISDICTIONAL STATEMENT

On April 3, 1984, the Eighth Circuit Court of Appeals in St. Louis, Missouri, entered judgment and filed an Opinion finding for the Respondent. Petitioner, on April 17, 1984, filed a Peti-

tion for Rehearing En Banc which was denied by the Eighth Circuit Court of Appeals on May 3, 1984.

This Court's jurisdiction is invoked under 28 U.S.C. §1254 and Rules of the Supreme Court No. 20 (1980).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 2035 of the Internal Revenue Code as passed by the Tax Reform Act of 1976 (Public Law 94-455, Section 2001(a)(5)) and in effect at the time of the transfer herein read as follows:

> (a) Inclusion of Gifts Made by Decedent.—Except as provided in subsection (b), the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, during the 3-year period ending on the date of decedent's death.
>
> (b) Exceptions.—Subsection (a) shall not apply to—
>
> (1) any bona fide sale for an adequate and full consideration in money or money's worth, and

(2) any gift excludable in computing taxable gifts by reason of section 2503(b) (relating to $3,000 annual exclusion for purpose of the gift tax) determined without regard to section 2513(a).

The Revenue Act of 1978 (Public Law 95-600, Section 702(F)) signed into law on November 6, 1978 changed the provision of Section 2035(b) of the Internal Revenue Code to read as follows:

(b) Exceptions.—Subsection (a) shall not apply—

(1) to any bona fide sale for an adequate and full consideration in money or money's worth, and

(2) to any gift to a donee made during a calendar year if the decedent was not required by section 6019 to file any gift tax return for such year with respect to gifts to such donee.

Paragraph (2) shall not apply to any transfer with respect to a life insurance policy.

STATEMENT OF THE CASE

On June 13, 1977, Richard Fein died of a heart attack. His surviving spouse, Sue Fein, became the duly appointed and acting Executrix (now known as Personal Representative) of the Estate of Richard Fein, Deceased, pursuant to Letters Testamentary issued by the Probate Court of the County of St. Louis, State of Missouri, on July 12, 1977.

Sue Fein referred to as "the petitioner," is a resident of the County of St. Louis, State of Missouri, and a citizen of the United States.

Decedent, prior to his death, applied to the New Jersey Life Insurance Company for a policy on his life. The New Jersey Life Insurance Company issued a policy on the life of the decedent on January 4, 1977. On March 15, 1977, the decedent sign-

ed a change of ownership form supplied by the New Jersey Life Insurance Company transferring all right, title and interest in and to the policy to Sue Fein, his wife. This change of ownership was received by New Jersey Life Insurance Company on March 21, 1977, and was executed by a representative of that company on March 22, 1977. Prior to the change of ownership one annual premium of $2,083.75 had been paid by decedent to the New Jersey Life Insurance Company. Under the terms of the policy, the policy had no cash surrender value for one year from the date of issue. Upon the death of Richard Fein, the death benefit provided under said policy was paid to Sue Fein.

Without regard to the life insurance policy, which is the subject of this litigation, Richard Fein made no transfers for less than adequate and full consideration for the period of time June 13, 1976 through the date of Richard Fein's death, June 13, 1977.

On March 13, 1978, the petitioner timely filed with the District Director of Internal Revenue in Clayton, Missouri, a United States Estate Tax Return for the Estate of Richard Fein, showing estate tax due in the amount of $74,532.90. Payment of this amount accompanied the return. A delegate of the Secretary of the Treasury on April 17, 1978, assessed against the Estate of Richard Fein the tax shown due on the estate tax return in the amount of $74,532.90 which had already been agreed to and paid. The estate tax return of the Estate of Richard Fein was audited by the Internal Revenue Service. On December 11, 1979, the petitioner filed a Form 890 Waiver of Restrictions on Assessment and Collection of a Deficiency of an additional $18,982.89. On the same date, petitioner paid the amount of tax, together with $1,982.54 in interest. On January 21, 1980, the Internal Revenue Service sent to petitioner an examination report explaining additional proposed deficiency in estate tax including both the agreed amount of $18,982.89 and an additional amount of $12,750.00. After a protest and hearing in the St. Louis Appeals Office, petitioner filed on February

13, 1981, a Form 890 Waiver of Restrictions on Assessment and Collection of an additional $20,434.76 in estate tax, less State Death Tax Credit of $8,884.76 to the extent verified. Payment of the State Death Tax was subsequently verified. All amounts of tax and interest were assessed by agents of the Secretary and duly paid by the petitioner.

The petitioner, as Personal Representative of the Estate of Richard Fein, filed with the Internal Revenue Service Center of Kansas City, Missouri, on September 18, 1981, a claim for refund of taxes in the sum of $11,549.98 plus interest and additions. No ruling was made by the Internal Revenue Service concerning the petitioner's claim for refund. The petitioner filed her petition in the United States District Court for the Eastern District of Missouri, Eastern Division, on March 29, 1982, which was more than six months after petitioner filed her claim for refund. Jurisdiction was conferred on the District Court under 28 U.S.C. § 1346(a)(1). Subsequently, the United States of America, on behalf of Robert Lebaube, filed a motion to substitute the United States of America, as defendant, which motion was granted, and the United States of America then filed its answer. The case was tried upon a joint stipulation of facts and accompanying affidavits. The District Court entered judgment on behalf of the defendant on May 31, 1983.

On June 28, 1983, pursuant to Federal Rules of Appellate Procedure, the petitioner timely filed a Notice of Appeal with the Clerk of the District Court. Subsequently, all records, briefs and oral arguments were presented to a panel of the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the judgment of the District Court in its opinion rendered on April 3, 1984.

On April 17, 1984, pursuant to Federal Rules of Appellate Procedure and Local Rules of the United States Court of Appeals for the Eighth Circuit, the petitioner requested a rehearing en banc by the entire Eighth Circuit Court of Appeals. Said rehearing was denied on May 3, 1984.

The petitioner then petitioned this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. There Is A Long Line Of Legal Precedents Of The Supreme Court Of The United States In The Estate Tax Field That Do Not Allow An Estate Taxing Statute To Be Applied To Transactions Occurring Prior To Its Enactment And The Finding of The Eighth Circuit Court Of Appeals In This Case Would Overturn Those Precedents.

The Supreme Court of the United States has repeatedly held that an estate tax law may not be applied retroactively.

This Court has never directly overturned a long line of estate and gift tax cases which specifically do *not* allow retroactive application of an estate tax law. *Nicholas v. Coolidge,* 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184 (1927). *Helvering v. Helmholz,* 296 U.S. 93, 56 S.Ct. 68, 80 L.Ed. 76 (1935). *White v. Poor,* 296 U.S. 98, 56 S.Ct. 66, 80 L.Ed. 80 (1935), *Untermeyer v. Anderson,* 276 U.S. 440 (1928). These cases are still authoritative in the estate and gift tax field. Almost every income tax case allowing retroactive application has clearly distinguished itself from the cited cases by the statement that estate tax law is not controlling in the income tax field. *United States v. Darusmont, et ux,* 101 S.Ct. 549, 81-1 U.S.T.C. ¶9137 (1981).

The District Court and the Court of Appeals both chose to ignore the long-standing legal principal that estate tax laws cannot be given retroactive effect and relied upon only two estate tax cases saying that an estate tax law can be retroactively amended, namely, *Milliken v. United States,* 283 U.S. 15 (1931) and *Estate of Ceppi v. Commissioner,* 698 F.2d 17 (1st Cir. 1983). These cases are not on point. Both cases involve situations where an asset is includable in the tax base of an estate and the rate of tax applied to the asset and all other assets in the estate is increased

retroactively. In our *case it is admitted by both the* District Court and the Court of Appeals that the life insurance policy would not have been included in the tax base of decedent's estate without the retroactive change in the estate tax law. See (Appendix pp. A-5, A-10).

The Eighth Circuit takes the position that the change of which the petitioner herein complains is "closer in kind and in effect to a mere increase in the tax rate than to the enactment of a wholly new law." (See Appendix at A-12). Therefore the Court of Appeals' reasons that Section 2035(b)(2) of the Internal Revenue Code as adopted by the Revenue Act of 1978 can be applied retroactively. This conclusion ignores the concept presented in the *Milliken* case *supra* which is that *only* an estate tax rate may be applied retroactively. Section 2001(c) of the Internal Revenue Code defines tax rate by stating "Rate Schedule" and then sets forth the percent of tax to be applied to each level of tax base. That section clearly defines the tax rate in the estate tax field to be the percent of tax applied to the tax base. Section 2001(c) of the Internal Revenue Code does not state what is to compose the tax base but only what percent shall be applied to each level of tax base.

The statute involved in this case, namely: Section 2035(b) of the Internal Revenue Code, as amended by the Revenue Act of 1978, adds an asset to the tax base which was previously untaxed. The asset added is a life insurance policy given away by the decedent prior to his death. This change in the tax base is more than just a change in the rate of tax. The net effect is an increase in tax, but that is irrelevant to a consideration of what is being changed.

The District Court, in its opinion, states, "The practical concern of the donor or taxpayer is with the amount of taxes due. Therefore, an increase in the tax base has the same effect as an increase in the tax rate." (See Appendix at A-5). While this statement may be true, it points out the misconception held by the District Court and apparently adopted by the Eighth Circuit

in its opinion. This misconception is that there is no difference between what composes the tax base and what is taxed by the tax rate. The tax rate is only the percentage to be applied to the base, and the base is what assets are to be taxed. This distinction has been adopted by this Court in the case of *Milliken, supra. This Court was clear to point out that Milliken* did not overrule any prior case but only created an exception to prior cases allowing for changes in the tax rate. *White, supra,* which was decided after *Milliken,* reaffirmed the principal that an estate tax law may not be applied retroactively. By merging the difference between tax base and tax rate, the District Court and the Eighth Circuit Court of Appeals have overturned the distinction that the Supreme Court of the United States has upheld for over fifty years.

The only estate tax case, other than *Milliken,* relied upon by the District Court and the Eighth Circuit Court of Appeals in their opinions is *Estate of Ceppi v. Commissioner,* 698 F.2d 17 (1st Cir.) *cert. denied,* 103 S.Ct. 3088 (1983). This case, since it is a Court of Appeals case, can not overturn a long line of Supreme Court precedents, and so must be given little or no weight when compared to *Nicholas, Helvering, White* and *Milliken.* Furthermore, the Court in *Estate of Ceppi* specifically stated that the issue presented in our case was irrelevant to their proceedings. In the *Ceppi* case it was admitted that the gifts in question were includable in decendent's gross estate; the question presented was whether the increase in value of the gifts was includable in the estate, which question was only a question of dollars applied to the percentages, and not a question of adding an asset to the tax base. The *Ceppi case is more similar to Milliken* because of the concession that the gifts were already added into the estate. Our case, on the other hand, does concede that the asset should be included in the tax base, and to ignore that fact is to ignore the thrust of the entire *Ceppi* case.

Therefore, the estate tax cases, cited by the Eighth Circuit in its opinion, do not apply to the case at hand and, therefore, do

not provide any basis for the retroactive application of an estate tax law. Allowing retroactive application in this case would effectively overturn the long line of precedents established by this Court.

II. Cases In The Income Tax Field Would Allow Retroactive Application Of A Tax Law But These Precedents Have Never Before Been Applied In The Estate Tax Field As The Eighth Circuit Court Of Appeals Did In This Case.

The United States Court of Appeals for the Eighth Circuit states, "There is nothing unusual about retroactive tax laws." (See Appendix at A-10). This statement would be appropriate if this case was an income tax case. Most of the cases cited by the Eighth Circuit in support of their decision are cases in the income tax area.

The Eighth Circuit places great weight on the case of *United States v. Darusmont, et ux.*, 101 S.Ct. 549, 81-1 U.S.T.C., ¶9137 (1981). This case is the most recent Supreme Court case in the area. *Darusmont* dealt with a retroactive change in the income tax laws dealing with minimum tax. This Court in *Darusmont* reiterated the distinction between estate tax cases and income tax cases stating that estate and gift tax cases are not "controlling authority with respect to any retroactive feature of a federal income tax." This quote points out this Court's recognition of the difference between estate tax cases and income tax cases. The Eighth Circuit failed to accept this difference as shown by its citations to income tax cases to support its decision of retroactive application of an estate tax law.

There have been many cases in the income tax field decided by the Supreme Court of the United States allowing retroactive imposition of an income tax law. None of these cases overturned the cases cited in the estate tax field and when those cases were used as authority in the income tax field, this Court distinguished them rather than overturn them. *Darusmont, supra.*

The Eighth Circuit Court of Appeals' reliance upon cases in the income tax field is clearly misplaced. This Court can not allow its precedents to be overturned by lower courts using a rationale rejected by this Court.

III. Even In Applying The Income Tax Precedents Allowing Retroactive Application Of A Law, The United States Court Of Appeals For The Eighth Circuit Incorrectly Determined That The 1978 Amendment To Section 2035(b)(2) of I.R.C. Was Constitutional.

The income tax cases decided by the Supreme Court that have given retroactive application to a statute have applied a test to determine its constitutionality. *Welch v. Henry,* 305 U.S. 134, 83 L.Ed. 87, 59 S.Ct. 121 (1938). The *Welch* test states that the Court must examine the nature of the tax and the circumstances in which it is being imposed to determine whether the taxing provision's retroactive application is "so harsh and oppressive" as to trigger a constitutional limitation.

The United States states, in its appellate brief to the Eighth Circuit, that the statute is not harsh and oppressive as applied to the facts of this case, because, "Had the decedent chosen not to make the gift, the proceeds of the policy still would have been included in his gross estate under Section 2042 of the Code." Although this may be true, one must look beyond the mere fact of the taxing inclusion of the policy in decedent's estate to determine whether or not the decedent suffered a hardship because of the transfer of the policy which he would not have suffered if he had maintained ownership over the policy.

Upon transferring the policy the decedent lost all control over said policy. Obviously the decedent was willing to do that, provided he was not taxed with the policy. Congress, by changing the statute after the date of transfer and after the date of decedent's death, forces upon the decedent the worst possiblity: lost control of the policy and taxation of the policy upon him.

Furthermore, Congress, by amending the statute, forced additional tax upon the decedent which could not have been anticipated. Since we are actually dealing with two taxpayers, namely the decedent and his wife, one must realize that at the time the decedent transferred the policy he had two choices on how to avoid double taxation of the policy: (a) transfer the policy to his wife, thereby avoiding taxation in his estate but having the policy proceeds taxed in the wife's estate upon her death, or (b) naming the beneficiary of the policy his Trust, which was created in his Last Will and Testament, which would have had the policy proceeds taxed upon this death but not taxed upon his wife's death. As a result of the decisions below, the proceeds of the policy will be taxed in the decedent's Estate and then again upon the death of his widow. The United States wishes to doubly tax the proceeds of the insurance policy. This double taxation outcome is obviously harsh and oppressive. Indeed, it may have been the wish of the decedent to avoid taxation of the policy within his Estate by the transfer of the policy to his wife, but should that allow the United States to impose a double tax upon the asset?

The Eighth Circuit Court of Appeals, in support of its assessment that the retroactive application is not arbitrary nor oppressive, states that, "There is no evidence that Mr. Fein relied on or even knew about the $3,000.00 exclusion in the 1976 version of Section 2035(b)." (See Appendix at page A-11). This statement is contrary to the law which presumes that all persons know the legal consequences of their actions when the action is taken. Since this is the presumption of the law it would be incumbent upon the respondent to introduce evidence that decedent did not know the legal consequences of his action rather than the duty of the petitioner to show he did. It was impossible for Mr. Fein to know about the 1978 amendment to the law which taxed Mr. Fein's estate with property Mr. Fein had given away before the law was passed, since the proposed amendment changing the law was introduced into Congress more than one month after Mr. Fein died.

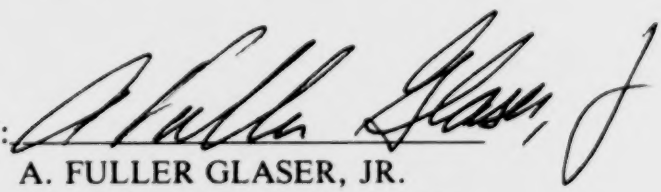
The decedent's inability to foresee that a transfer of his life insurance would not be effective to avoid taxation in his Estate is an important consequence in these circumstances: it made the decedent lose control of an asset with no benefit, and it forced the life insurance policy to be subject to double taxation. It is hard to conceive of a set of circumstances that is more clearly harsh and oppressive than these.

CONCLUSION

Based on the foregoing arguments and authorities, the petitioner prays that her Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

SELNER, GLASER & KOMEN, P.C.

BY: 

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CERTIFICATE OF SERVICE

It is hereby certified that service of this petition has been made on counsel for the respondent by mailing copies thereof on this 31st day of July, 1984, in envelopes, with postage prepaid, properly addressed to them as follows:

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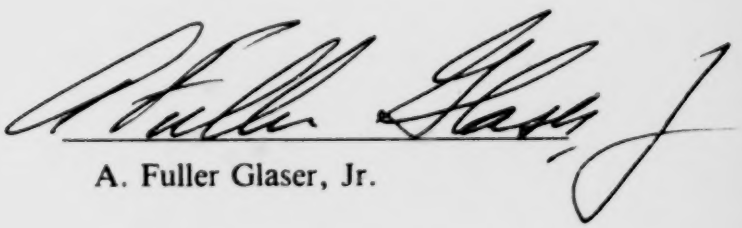

A. Fuller Glaser, Jr.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0458C(3)

SUE FEIN, Personal Representative of the
Estate of Richard Fein,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT
(Filed May 31, 1983)

In accordance with the memorandum opinion of the Court filed this day, which is incorporated into and made a part of this judgment,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be and the same is entered in favor of defendant, United States of America, and against plaintiff, Sue Fein, Personal Representative of the Estate of Richard Fein. Costs, if any, shall be taxed against plaintiff.

Dated this 31st day of May, 1983.

/s/ William Hungate
United States District Judge

MEMORANDUM
(Filed May 31, 1983)

Pursuant to the consent order entered February 15, 1983, this case was tried to the Court based on the parties' joint stipulation of facts and documentary exhibits, filed February 8, 1983, and the written memoranda of the parties regarding the legal issues remaining in dispute.

This action was filed to obtain a refund of certain federal estate taxes paid by plaintiff, Sue Fein, as personal representative of the estate of Richard Fein. The matter to be resolved is the proper estate tax treatment of a life insurance policy transferred by the decedent in March, 1977, three months prior to his death.

Having considered the pleadings, exhibits, stipulations, and memoranda of the parties, and being fully advised in the premises, the Court hereby makes and enters the following findings of fact and conclusions of law.

Findings of Fact

1. On October 12, 1976, Richard Fein applied to the New Jersey Life Insurance Company for a life insurance policy.

2. On January 4, 1977, New Jersey Life Insurance Company issued policy no. 129701 (the policy) in the name of Richard Fein. (Stipulation Exh. 1.) The policy proveded for a death benefit of $75,000 and had an annual premium of $2,083.75. One annual premium was paid on the policy prior to the decedent's death. Under the terms of the policy, it had no cash surrender value for one year from the date of issue.

3. On February 15, 1977, Richard Fein submitted an Amendment to Application related to the policy, making several changes in factual data and requested coverage, but not changing the ownership of the policy.

4. On March 15, 1977, Richard Fein executed a change of ownership form, transferring all rights, title, and interest in the policy to Sue Fein, his wife. The change of ownership form was received by New Jersey Life Insurance Company on March 21, 1977, and executed by a representative of the company on March 22, 1977. The transfer was made without the payment of consideration in money or money's worth.

5. The evidence failed to establish that anyone other than Richard Fein was the intended owner of the policy from the date of issuance to the time of the transfer of March 15, 1977.

6. On June 13, 1977, Richard Fein died of a heart attack. Plaintiff was appointed executrix (now known in Missouri as personal representative) of decedent's estate.

7. The $75,000 due under the policy was paid to plaintiff.

8. On March 13, 1978, plaintiff timely filed a United States tax return for the estate of Richard Fein, and paid estate tax shown due thereon in the amount of $74,532.90. No part of the death benefit under the policy was included in the decedent's gross estate on the return.

9. Subsequently, an estate tax deficiency of $30,532.89 and interest totalling $4,772.63 was assessed against the estate of Richard Fein. Plaintiff made payments in satisfaction of all assessments.

10. On September 24, 1981, plaintiff timely filed a claim for refund of $11,549.98 in estate tax plus interest reflecting the inclusion of the policy in the decedent's gross estate. No other assessment issues remain in dispute. The Commissioner of Internal Revenue neither allowed nor disallowed the claim for refund.

11. This action was timely filed on March 29, 1982, seeking refund of the $11,549.98 plus interest.

Conclusions of Law

1. The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1346(a)(1) and this action is properly brought in accordance with 26 U.S.C. §§ 6532(a) and 7422(a).

2. At the time of decedent's death, the Internal Revenue Code provided that:

> The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.
>
> 26 U.S.C. § 2031(a).

3. As enacted (and effective at the time of decedent's demise) in the Tax Reform Act of 1976, P.L. 94-455, Section 2001(a)(5) amended Internal Revenue Code § 2035 to provide as follows:

> (a) *Inclusion of gifts made by decedent.* Except as provided in subsection (b), the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, during the 3-year period ending on the date of the decedent's death.
>
> (b) *Exceptions.* Subsection (a) shall not apply to—
>
> (1) any bona fide sale for an adequate and full consideration in money or money's worth, and
>
> (2) any gift excludable in computing taxable gifts by reason of section 2503(b) (relating to $3,000 annual exclusion for purposes of the gift tax) determined without regard to section 2513(a).

4. Section 702(f) of Public Law 95-600, otherwise known as the Revenue Act of 1978, approved November 6, 1978, amended subsection 2035(b) as follows:

(b) *Exceptions.* Subsection (a) shall not apply—

(1) to any bona fide sale for an adequate and full consideration in money or money's worth, and

(2) *to any gift to a donee made during a calendar year if the decedent was not required by section 6019 to file any gift tax return for such year with respect to gifts to such donee. Paragraph (2) shall not apply to any transfer with respect to a life insurance policy.*

(emphasis added.) 92 Stat. 2930.

5. The effective date for the amendment provided under section 702(f)(2) specified that the 1978 version of § 2035(b)(2) "shall apply to the estates of decedents dying after December 31, 1976, except that it shall not apply to transfers made before January 1, 1977." 92 Stat. 2930. Therefore, the amended version of § 2035(b)(2) was expressly made retroactive with regard to transfers of life insurance policies occurring on or after January 1, 1977. *See Estate of Ceppi v. Commissioner of Internal Revenue,* 698 F.2d 17, 18 (1st Cir. 1983).

6. The taxation of gifts made prior to death through their inclusion in the value of a decedent's gross estate is not an unconstitutional violation of due process of law simply by virtue of the fact that liability is retroactively imposed. *Milliken v. United States,* 283 U.S. 15, 21-22 (1931).

7. The practical concern of the donor or taxpayer is with the amount of taxes due. Therefore, an increase in the tax base has the same effect as an increase in tax rate. *Estate of Ceppi v. Commissioner of Internal Revenue, supra* at 21. The specific inclusion of the policy required under the 1978 amendments to § 2035(b)(2) increased the tax base by inclusion in the gross estate of Richard Fein.

8. Where a tax is imposed through enactment of provisions which merely change the rate of an existing tax or the base from which it is determined, rather than imposing a new, separate

and distinct type of tax, its retroactive application is constitutionally permissible. *Westwick v. Commissioner of Internal Revenue,* 636 F.2d 291, 292 (10th Cir. 1980); *Buttke v. Commissioner of Internal Revenue,* 625 F.2d 202, 203 (8th Cir. 1980); *Sidney v. Commissioner of Internal Revenue,* 273 F.2d 928, 932 (2d Cir. 1960).

9. Retroactive imposition of the tax in question was neither arbitrary, harsh, nor oppressive. The 1978 amendments to § 2035(b)(2) did not impose a wholly new tax with respect to which plaintiff would have had no reason to suppose that any transaction of the sort here concerned would be taxed at all. *See United States v. Darusmont,* 449 U.S. 292, 296-301 (1981); *Cohan v. Commissioner of Internal Revenue,* 39 F.2d 540, 545 (2d Cir. 1930); *see also Estate of Ceppi v. Commissioner of Internal Revenue, supra* at 20-22.

10. The policy was properly included in the value of the gross estate of Richard Fein for federal estate tax purposes. 26 U.S.C. § 2035(b)(2), as amended (1978).

11. For purposes of inclusion in the gross estate under § 2035, the value of the policy was $75,000. 26 U.S.C. § 2031(a); 26 C.F.R. §§ 20.2031-1(a), 20.2031-1(b), 20.2035-1(e); *First National Bank of Oregon v. United States,* 488 F.2d 575, 577-78 (9th Cir. 1973).

Accordingly, judgment will be entered in favor of defendant and against plaintiff.

Dated this 31st day of May, 1983.

/s/ William Hungate
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1868-EM September Term, 1983

Sue Fein, etc.
Appellant,

vs.

United States of America,
Appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

April 3, 1984

Total costs of appellee for
briefs for recovery
from appellant: $69.00

A true copy.
ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT
5/15/84

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1868

Sue Fein, Personal Representative
of the Estate of Richard Fein,
Appellant,

vs.

United States of America,
Appellee.

On Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: January 10, 1984
Filed: April 3, 1984

Before ROSS and ARNOLD, Circuit Judges, and HARRIS,* Senior District Judge.

ARNOLD, Circuit Judge.

In 1977, Richard Fein gave an insurance policy on his own life to his wife. He died about three months later. The Internal Revenue Service applied a provision of the Revenue Act of 1978 to this gift and included the proceeds of the policy in Mr. Fein's estate for tax purposes. The issue in this case is the constitutionality of this retroactive application of the 1978 Act to the

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* The Hon. Oren Harris, Senior United States District Judge for the Eastern and Western District of Arkansas, sitting by designation.

1977 transfer. The District Court[1] found this application constitutional. We affirm.

I.

On January 4, 1977, the decedent took out a policy on his own life. He gave the policy to his wife, effective March 22, 1977. The parties agree that at the time of the transfer the policy was worth less than $3,000. Further, the parties agree that at that time the transfer would have been effective to remove the policy and its proceeds from the donor's estate. Section 2035(b)(2) of the Internal Revenue Code of 1954, 26 U.S.C. §2035(b)(2), as it was written at the time, excluded all transfers of less than $3,000 in value from a decedent's gross estate.[2]

Mr. Fein died on June 13, 1977. Following his death, on November 6, 1978, the Revenue Act of 1978 became law. Among other things, it took life insurance policies out of §2035 (b)(2) altogether.[3] The new law also provided that it would be

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[1] The Hon. William L. Hungate, United States District Judge for the Eastern District of Missouri.

[2] Before the enactment of the Tax Reform Act of 1976, gifts made within three years of death were rebuttably presumed to be in contemplation of death, and transfers in contemplation of death were ineffective to reduce the gross estate. In 1976 Congress changed the law, so that all transfers within three years of death were *ipso facto* included in the estate without regard to the decedent's state of mind, with certain exceptions. Tax Reform Act of 1976, Pub. L. No. 94-455, §2001(a)(5), 90 Stat. 1520, 1848. One of the exceptions, §2035(b)(2), was for "any gift excludable in computing taxable gifts by reason of . . . $3,000 annual exclusion . . . ."

[3] The amended version of §2035(b) states:

> Paragraph (2) shall not apply to any transfer with respect to a life insurance policy.

effective with respect to transfers made after January 1, 1977, by decedents dying after December 31, 1976. Revenue Act of 1978, Pub. L. No. 95-600, §702(f)(2), 92 Stat. 2763, 2930. Thus, if the 1978 amendments apply, the proceeds of the decedent's life-insurance policy are includable in his estate.

II.

There is nothing unusual about retroactive tax laws. "Congress almost without exception has given each statute an effective date prior to the date of actual enactment. . . . Usually the 'retroactive' feature has application only to that portion of the current calendar year preceding the date of enactment, but each of the Revenue Acts of 1918 and 1926 was applicable to an entire calendar year that had expired preceding enactment." *United States v. Darusmont,* 449 U.S. 292, 296 (1981) (per curiam). Most such retroactive enactments have been upheld as against due-process challenges, on the theory that some limited retroactivity is necessary as a practical matter to prevent the revenue loss that would result if taxpayers, aware of a likely impending change in the law, were permitted to order their affairs freely to avoid the effect of the change.

The retroactive application of a tax statute may still, in a given case, be so unreasonable as to amount to a deprivation of property without due process of law. In determining whether a tax meets this threshold, the Supreme Court has looked to two main considerations: whether the change in the tax law was reasonably foreseeable, see *Darusmont, supra,* 449 U.S. at 299 (assuming arguendo relevance of foreseeability of tax change); *Welch v. Henry,* 305 U.S. 134, 147 (1938); *Milliken v. United States,* 283 U.S. 15, 23-24 (1931); *Untermeyer v. Anderson,* 276 U.S. 440, 445-46 (1928); *Buttke v. Commissioner,* 625 F. 2d 202, 203 (8th Cir. 1980) (per curiam) (taxpayer should have "anticipated" tax change), *cert. denied,* 450 U.S. 982 (1981); and whether the change was only a change in tax rate or the imposition of a new tax, see *Darusmont, supra,* 449 U.S. at 300;

Milliken, supra, 283 U.S. at 23-24; *Estate of Ceppi v. Commissioner,* 698 F.2d 17, 21 (1st Cir.), *cert. denied,* 103 S.Ct. 3088 (1983). The latter consideration is grounded on the former, in that a change in the tax rate is considered by its very nature to be reasonably foreseeable, whereas the imposition of a new tax may not be. See *Milliken, supra,* 283 U.S. at 23-24.

There is no evidence that Mr. Fein relied on or even knew about the $3,000 exclusion in the 1976 version of Section 2035(b). There is no reason to suppose that, had he known the law would later be changed, he would have kept the policy for himseif, or never have bought it to begin with. The burden of showing that a law is so unfair as to violate the Due Process Clause must be on the party attacking the statute. The whole reason why retroactivity raises a question is that it may disappoint settled and reasonable expectations. No doubt Mr. Fein's beneficiaries had a nasty shock when they learned about the 1978 law. But their disappointment results from an assumption (natural enough) that the law applicable at the time of death, and at the time of the filing of the estate-tax return, would continue to be applicable. By that time all of the operative taxable events had occurred. Nothing could be done to change them. Thus, though expectations may have been disappointed, there is nothing about this case so grossly unfair as to violate the Constitution, since the decedent has not been shown to have had any relevant expectations about the estate-tax laws when he bought and later gave away the policy.

Nor is this a case of the imposition of a completely new tax. There were estate and gift taxes long before 1977. The change in the law was simply the elimination of life-insurance policies from the $3,000 exception to the general rule with respect to gifts within three years of death. This kind of tinkering, though certainly annoying to taxpayers and their advisers, is a regular feature of the tax-law landscape. Every two years, if not every year, there is some sort of Revenue Act of Technical Amendments Act, and many of them are more or less retroactive. The

change of which plaintiff complains here is, we think, closer in kind and in effect to a mere increase in the tax rate than to the enactment of a wholly new tax.

In coming to this conclusion, we have been greatly aided by Judge Bailey Brown's analysis in *Estate of Ceppi, supra.* That case also involved the 1978 amendment to Section 2035(b)(2). Under the prior law, property given away within three years of death was, as we have already seen, not included in the estate if it was worth less than $3,000. In addition, gifts worth more than $3,000 were included only to the extent that their value exceeded $3,000. If property worth $30,000 was given away, only $27,000 was included in the eatate. While this state of the law obtained, gifts were made and the donor died. Then the Revenue Act of 1978 was passed, and by its terms the entire value of gifts worth more than $3,000 (that is, $30,000, to use the example just given) was included in the estate. Retroactive application of this change was upheld against a due-process attack.

It is possible to distinguish *Ceppi.* There, it can be said, there was no doubt that the property given away was of a type includible in the estate; the only dispute was over the *extent* of includibility—whether for the whole value, or for the whole value less $3,000. Here, on the other hand, the new law wholly destroys the application of the $3,000 exemption to a distinct kind of property—policies of life insurance. But we think the attempted distinction is not significant enough to make a constitutional difference. The fact remains unavoidable that the 1978 Act was far from a wholly new tax, and the modern trend of decisions has uniformly been to limit the cases on which the taxpayer here most strongly relies—*Milliken v. United States, supra,* and *Untermyer v. Anderson, supra*—to that narrow situation. See *Estate of Ceppi, supra,* 698 F.2d at 21, and our own treatment of *Untermyer* in *Buttke v. Commissioner, supra,* 625 F.2d at 203 (reading *Untermyer* to forbid "retroactive application of a wholly new tax").

Affirmed.

A true copy.

Attest: /s/ Robert D. St.Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1868-EM. September Term, 1983

SUE FEIN, ETC.,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

The Court, having considered appellant's petition for rehearing en banc and now fully advised in the premises, hereby orders the petition for rehearing en banc denied.

May 3, 1984